

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

THOMAS WRAY HERNDON.

Case No. 3:22-CV-00271-ART-CLB

Plaintiff,

Case No. 3:22-CV-00271-ART-CLD

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AS
PREMATURE**

STATE OF NEVADA ex rel. NDOC, et al.

[ECF No. 24]

Defendants.

Defendants

This case involves a civil rights action filed by Plaintiff Thomas Wray Herndon (“Herndon”) against Defendants Deputy Director Brian Williams (“Williams”), Acting Warden Tim Garrett (“Garrett”), Deputy Director Harold Wickham (“Wickham”), Caseworker C. Potter (“Potter”), and Chaplain Davis (“Davis”) (collectively referred to as “Defendants”). Currently pending before the Court is Herndon’s motion for summary judgment. (ECF No. 24.) Defendants responded, (ECF No. 25), and Herndon replied. (ECF No. 29.) For the reasons stated below, the Court recommends that Herndon’s motion for summary judgment, (ECF No. 24), be denied as premature.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 16, 2022, Herndon submitted a civil rights complaint under 42 U.S.C. § 1983 together with an application to proceed in forma pauperis for events that occurred while Herndon was incarcerated at Lovelock Correctional Center (“LCC”). (ECF Nos. 1, 1-1.) On August 12, 2022, the District Court entered a screening order on Herndon’s complaint, allowing Herndon to proceed on the following claims: (1) First Amendment free exercise and RLUIPA; (2) First Amendment Establishment Clause; and (3) Fourteenth Amendment equal protection. (ECF No. 3 at 13.) Each claim was allowed to proceed against the following Defendants: Williams, Garrett, Whickham, Potter, and Davis. *Id.*

Defendants filed their answer on February 6, 2023. (ECF No. 14.) On February

1 13, 2023, the Court issued an order setting a mandatory case management conference
 2 and the exchange of initial disclosures. (ECF No. 15.) In that order, the Court explained:

3 Notwithstanding Federal Rules of Civil Procedure 26(a)(1)(B), the
 4 court finds that initial disclosures would be helpful in managing this action
 5 under Federal Rule of Civil Procedure 16, taking into account the extent of
 6 prisoner litigation in this district, the desire to manage those cases
 7 efficiently, the desire to secure the just, speedy, and inexpensive
 8 determination of this case, the importance of the issues at stake, the
 9 parties' relative access to relevant information, the parties' resources, the
 10 importance of discovery in resolving issues, and the value of initial
 11 disclosure of information obtained through the administrative grievance
 12 process. Accordingly, all parties are hereby ordered to provide initial
 13 disclosures with the following information.

14 (*Id.* at 2 (emphasis added) (internal citations omitted).) At the case management
 15 conference on March 3, 2023, the Court expressly explained Herndon's discovery
 16 obligations. (ECF No. 18¹.) During the hearing, the Court recommended that Herndon
 17 review the Federal Rules of Civil Procedure regarding discovery as well as the Local
 18 Rules of Practice for the District of Nevada. (*Id.* at 2.) The Court also "explain[ed]" that
 19 Mr. Herndon is expected to conduct discovery in his case and not rely on discovery in
 20 other inmate cases." (*Id.*)

21 Additionally, on March 6, 2023, the Court entered a scheduling order that ordered
 22 the exchange of initial disclosures. (ECF No. 19.) Specifically, the Court ordered:

23 All parties are required to produce information, items, and documents in
 24 their possession or control relevant to their own and other parties' claims
 25 and defenses, using the concept of relevance set forth in Rule 26(b)(1).
 26 Mandatory Disclosures must include all relevant information that, to the
 27 party's or the party's employer's knowledge, pertains to any party's claims
 28 or defenses in this case, including the names of individuals likely to have
 discoverable information, along with the subject of the information. The
 parties must also produce all information, items, documents, photographs,
 and video or audio recordings in their or their employer's possession or
 control that are relevant to the issues in this case. Disclosures may be
 made in a redacted form, if necessary, for security or privilege purposes.

27 ¹ ECF No. 18 consists of the minutes of the March 3, 2023, case management
 28 hearing.

1 (*Id.* at 2.) The Court further ordered “[i]f initial disclosures have not already been
 2 served, the parties’ mandatory disclosures must be served **no later than 30 days from**
 3 **the date of this order** unless disclosures are stayed.” (*Id.* at 3 (emphasis original).) The
 4 scheduling order also specified that discovery opened on March 6, 2023. (*Id.* at 1.)

5 On April 14, 2023, Herndon filed a motion for summary judgment. (ECF No. 24.)
 6 Defendants responded, (ECF No. 25), and Herndon replied. (ECF No. 29.) The motion
 7 for summary judgment was filed just over one month after discovery commenced. The
 8 claims underlying this lawsuit relate to Herndon’s ability to participate in the 2020
 9 Passover services as a Messianic Jew. (ECF No. 24 at 2-5.) Herndon argues he is
 10 entitled to summary judgment because the undisputed facts show that his rights under
 11 the First Amendment free exercise clause, First Amendment establishment clause,
 12 Fourteenth Amendment equal protection clause, and the RLUIPA were violated by all
 13 Defendants. (*Id.* at 8-19.) Herndon also argues that Defendants improperly asserted all
 14 affirmative defenses and are not entitled to qualified immunity. (*Id.* at 19-28.)

15 Defendants argue Herndon’s motion for summary judgment fails because: (1)
 16 Defendants did not substantially burden Herndon’s right to religious exercise and the
 17 NDOC policy in question was implemented in furtherance of a legitimate penological
 18 purpose; (2) Defendants did not prefer other religions over Messianic Judaism; (3)
 19 Defendants did not discriminate against Herndon on the basis of his religion; (4) Garrett,
 20 Whickham, Potter, and Davis were not personally involved in the underlying allegations;
 21 (5) Defendants are entitled to qualified immunity; and (6) Herndon violated the Federal
 22 Rules of Civil Procedure and the Court’s orders by failing to comply with initial
 23 disclosure requirements and improperly utilizes exhibits. (ECF No. 25.) In the
 24 alternative, Defendants request the Court grant summary judgment in their favor
 25 pursuant to the Court’s authority under Federal Rule of Civil Procedure 56(f).² (*Id.* at 2,
 26 7-11, 13-16, 18.)

27
 28 ² The Court declines to exercise that authority.

1 In his reply, Herndon reiterates the arguments made in the motion for summary
 2 judgment and addresses some of the arguments in Defendants' opposition. (ECF No.
 3 29.) As to the issue of initial disclosures and exhibits to the motion for summary
 4 judgment, Herndon argues he does not have to provide any initial disclosures because
 5 Federal Rule of Civil Procedure 26(a)(1)(B)(iv) provides an exemption from the
 6 requirement for *pro se* inmate cases. (*Id.* at 11-12.) He contends that because of that
 7 provision, he does not "have to follow an invalid order pertaining to that said rule." (*Id.* at
 8 12.) Herndon also admits that he used records from another inmate's case but argues
 9 there is no harm to Defendants. (*Id.*)

10 **II. MOTION FOR SUMMARY JUDGMENT**

11 "Motions for summary judgment can be filed at any time but are often denied as
 12 premature when submitted before the parties have had time to conduct at least some
 13 discovery." *Smith v. Jones*, No. 3:20-CV-0504-MMD-CLB, 2021 WL 5968455, *1 (D.
 14 Nev Dec. 6, 2021) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548,
 15 91 L.Ed.2d 265 (1986) (quotations omitted)). Although Rule 56 allows a party to file a
 16 motion for summary judgment "at any time," the rule also allows the court, as is just, to
 17 deny the motion or order a continuance for the opposing party to pursue discovery. Fed.
 18 R. Civ. P. 56 (Advisory Committee's Notes (2010 Amendments Subdivision (b))).

19 From statements made by Defendants in their opposition to Herndon's motion for
 20 summary judgment, it is apparent that Defendants have not had the opportunity to
 21 pursue discovery in this case. Defendants state that they "have not received Herndon's
 22 Initial Disclosures or any document informing the Defendants of which documents
 23 Herndon intended to use to support his claims or defenses." (ECF No. 25 at 17.)
 24 Defendants also provide a declaration from Deputy Attorney General Andrew C. Nelson
 25 stating the same. (ECF No. 25-5.)

26 The vast majority of the 286 pages of attached exhibits to Herndon's motion for
 27 summary judgment are documents that were provided as discovery in *other* cases –
 28 involving parties *other* than Herndon. These documents are clearly not discovery from

1 this case, as can be seen from the presence of other case numbers and bates
 2 numbering from other cases. For example:

- 3 • Documents that are bates stamped with “JOSEPH 289: Def. Supl. Resp. to
 4 RFPDs [1].” (ECF No. 24 at 29-169.)
- 5 • Multiple responses to discovery requests, Requests for Admissions by the
 6 Plaintiff,³ and Defendant’s motion for summary judgment in the case *Joseph v.*
 7 *State of Nevada ex rel. NDOC, et al.*, No.3:21-cv-00289-RCJ-CSD (D. Nev. filed
 8 July 1, 2021).⁴ (ECF No. 24 at 170-206, 253-259, 284-306.)
- 9 • Multiple responses to discovery requests and documents containing ECF filing
 10 information that is automatically populated on documents filed on CM/ECF, the
 11 Court’s electronic filing system, for the case *Enriquez v. State of Nevada*
 12 *Department of Corrections, et al.*, No. 3:21-cv-00085-ART-CSD (D. Nev. filed
 13 Feb. 17, 2021).⁵ (ECF No. 24 at 207-252.)
- 14 • Documents that are bates stamped with “ENRIQUEZ 085: Def. Garrett Resp. to
 15 RFPD [1].” (*Id.* at 307-311.)

16 Herndon also includes an affidavit of Justin O. Langford, the “Legal
 17 Assistant/Paralegal” who assisted Herndon in submitting his motion for summary
 18 judgment. (*Id.* at 1, 313-314.) Curiously, the affidavit contains scratched out portions at
 19 the top that match the size of the ECF filing information automatically populated on
 20 CM/ECF. The Court suspects that this affidavit may also be a filing from a separate
 21 lawsuit. In his reply, Herndon admits that he used records from another inmate’s case.

23 ³ This document was prepared by Justin O. Langford, the “Legal
 24 Assistant/Paralegal” who filed the instant motion for summary judgment. (ECF No. 24 at
 25 259.)

26 ⁴ Review of the docket for this case shows that the litigation involves a civil rights
 27 complaint by one Plaintiff, Martin Joseph, an inmate of the NDOC residing at LCC.

28 ⁵ Review of the docket for this case shows that the litigation involves a civil rights
 29 complaint by one Plaintiff, Antonio Enriquez, an inmate of the NDOC residing at LCC.

1 (ECF No. 29 at 12.)

2 The statements and declarations provided by Defendants in combination with the
 3 exhibits attached to Herndon's motion for summary judgment and Herndon's statements
 4 in his reply make it clear that Defendants have not had an opportunity to pursue
 5 discovery in this case. Therefore, the Court finds Herndon's motion for summary
 6 judgment is premature pursuant to Rule 56(d) of the Federal Rules of Civil Procedure.
 7 *Smith v. Jones*, 2021 WL 5968455 at *1 ("Motions for summary judgment can be filed at
 8 any time but are often denied as premature when submitted before the parties have had
 9 time to conduct at least some discovery."). Therefore, the motion for summary judgment
 10 should be denied to allow for both parties to complete discovery.⁶

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13 ⁶ If the Court were to reach the merits of the motion at this stage, Herndon's
 14 motion would likely fail because he fails to meet his burden as the moving party. In
 15 order for a motion for summary judgment to be granted, the parties must: (1) cite facts
 16 from the record, including but not limited to depositions, documents, and declarations,
 17 and then (2) "show[] that the materials cited do not establish the absence or presence of
 18 a genuine dispute, or that an adverse party cannot produce admissible evidence to
 19 support the fact." Fed. R. Civ. P. 56(c)(1). Documents submitted during summary
 20 judgment must be authenticated, and if only personal knowledge authenticates a
 21 document (i.e., even a review of the contents of the document would not prove that it is
 22 authentic), an affidavit attesting to its authenticity must be attached to the submitted
 23 document. *Las Vegas Sands, LLC v. Neheme*, 632 F.3d 526, 532-33 (9th Cir. 2011).
 24 Conclusory statements, speculative opinions, pleading allegations, or other assertions
 25 uncorroborated by facts are insufficient to establish the absence or presence of a
 26 genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007);
 27 *Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 856 (9th Cir. 2019). The moving party
 28 bears the initial burden of demonstrating an absence of a genuine dispute. *Soremekun*,
 509 F.3d at 984. "Where the moving party will have the burden of proof on an issue at
 trial, the movant must affirmatively demonstrate that no reasonable trier of fact could
 find other than for the moving party." *Id.*

25 Here, in addition to being unauthenticated, the vast majority of the documents
 26 provided by Herndon in support of this motion for summary judgment are not from the
 27 record in this case and cannot be relied upon to support Herndon's argument that there
 28 is no genuine dispute of material facts. As the moving party with the burden of proof at
 trial, Herndon has an affirmative duty to provide evidence to support his motion for
 summary judgment and his failure to do so seems to doom the motion entirely. *Id.*

1 **III. DISCOVERY ISSUES**

2 In addition to being the reason why the motion for summary judgment is denied
 3 as premature, the Court finds that the lack of discovery in this case is troubling.
 4 Herndon contends that he “does not have to conduct discovery if the evidence is readily
 5 available to him by other means.” (ECF No. 24 at 10.) Herndon also argues that he
 6 does not have to provide any initial disclosures because Federal Rule of Civil Procedure
 7 26(a)(1)(B)(iv) provides an exemption from the requirement for *pro se* inmate cases.
 8 (ECF No. 29 at 12.) He contends that because of that provision, he does not “have to
 9 follow an invalid order pertaining to that said rule.” (*Id.*) Herndon suggests that “[p]eople
 10 should really read things before risking looking like a fool.” (*Id.*)

11 However, the Court ordered Herndon to provide initial disclosures pursuant to its
 12 authority under Rule 16 and 26 on two separate occasions. (ECF No. 15 at 2, ECF No.
 13 19 at 3.) In 2000, the Federal Rules of Civil Procedure Advisory Committee Notes for
 14 Rule 26 were amended to note that “the court can order exchange of similar information
 15 in managing the action under Rule 16.” Fed. R. Civ. P. 26 (Advisory Committee Note
 16 (2000 Amendments)). Additionally, amendments in 1993 clarified that “[t]he
 17 enumeration in Rule 26(a) of items to be disclosed does not prevent a court from
 18 requiring by order or local rule that the parties disclose additional information without a
 19 discovery request.” Fed. R. Civ. P. 26 (Advisory Committee Note (1993 Amendment)).
 20 Therefore, the Court’s orders for the parties to provide initial disclosures is valid under
 21 Rule 16 and 26.

22 The failure to follow the Court’s orders is a basis for the Court to impose
 23 sanctions. LR IA 11-8(e) (“The court may, after notice and an opportunity to be heard,
 24 impose any and all appropriate sanctions on an attorney or party who. . . [f]ails to
 25 comply with any order of this court.”). Moreover, pursuant to Federal Rule of Civil
 26 Procedure 37(c)(1), “[i]f a party fails to provide information or identify a witness as
 27 required by Rule 26(a) or (e), the party is not allowed to use that information or witness
 28 to supply evidence on a motion, at a hearing, or at a trial, unless the failure was

1 substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "In addition to or instead
2 of this sanction, the court, on motion and after giving an opportunity to be heard" may
3 order payment of fees to the opposing party, inform the jury of the failure, or other
4 appropriate sanctions. *Id.* Rule 37(b)(2) of the Federal Rules of Civil Procedure provides
5 that if a party fails to obey an order to provide or permit discovery, the court may issue
6 further just orders, which may include the imposition of sanctions upon the disobedient
7 party, including dismissal of the action or proceeding in whole or in part. Fed. R. Civ. P.
8 37(b)(2)(A). Dismissal is available under the court's inherent power to sanction when "a
9 party has engaged deliberately in deceptive practices that undermine the integrity of
10 judicial proceedings" or "has willfully deceived the court and engaged in conduct utterly
11 inconsistent with the orderly administration of justice." *Leon*, 464 F.3d at 958
12 (citing *Anheuser-Busch, Inc. v. Nat. Beverage Distrib.*, 69 F.3d 337, 348 (9th Cir.
13 1995)).

14 In addition to providing two separate written orders explaining the initial
15 disclosure requirements, the Court also expressly explained Herndon's discovery
16 obligations to him during a case management hearing on March 3, 2023. (ECF No. 18
17 at 2 ("The Court explain[ed] that Mr. Herndon is expected to conduct discovery in his
18 case and not rely on discovery in other inmate cases.").) On March 6, 2023, the Court
19 issued a scheduling order and discovery plan that ordered "[i]f initial disclosures have
20 not already been served, the parties' mandatory disclosures must be served **no later**
21 **than 30 days from the date of this order** unless disclosures are stayed." (ECF No. 19
22 at 3 (emphasis original).) Therefore, Herndon's initial disclosures were due to
23 Defendants on or before April 5, 2023. As of May 5, 2023, the date Defendants filed
24 their opposition to the motion for summary judgment, Defendants had not received
25 Herndon's initial disclosures. (ECF No. 25 at 17.) The Court will give Herndon one final
26 opportunity to comply with the Court's orders to provide initial disclosures, (ECF No. 15,
27 18, 19). Herndon is therefore ordered to provide initial disclosures within fourteen days
28 of the filing of this order. The Court will consider possible sanctions should Herndon fail

1 to comply with this order.

2 **IV. CONCLUSION**

3 **IT IS HEREBY ORDERED** that Herndon's Motion for Summary Judgment, (ECF
4 No. 24), is **DENIED without prejudice as premature**. Herndon is permitted to file a
5 renewed summary judgment motion in accordance with the Discovery Plan and
6 Scheduling Order after discovery closes in this case.

7 **IT IS FURTHER ORDERED** that Herndon provide Defendants with his initial
8 disclosures, as required by the Court's orders at ECF No. 15 and 19, **within fourteen**
9 **days** of the issuance of this order.

10 **DATED:** June 14, 2023.

11 
UNITED STATES MAGISTRATE JUDGE

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